

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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UNITED STATES OF AMERICA, PETITIONER

E. F. CONVILLE, DAN TANSLEY, INC., ET AL

ON WRIT OF HABEAS CORPUS TO REMOVE FROM COURT OF TWO YEARS  
AND OVERSIGHT

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RECEIVED FOR THE COURT, OCTOBER 12, 1954

RECORDED AND INDEXED OCTOBER 14, 1954

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

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No. —

UNITED STATES OF AMERICA, PETITIONER,

vs.

R. P. SCOVIL, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF SOUTH CAROLINA

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1-2 The State of South Carolina in the Supreme Court

Appeal from Greenville County

G. Badger Baker, Judge

UNITED STATES OF AMERICA, APPELLANT-CLAIMANT,

vs.

R. P. SCOVIL, RESPONDENT-CLAIMANT

In Re: ROY BASS MOTOR CO., PLAINTIFF, vs. DAN TASSEY, INC.,  
DEFENDANT

TRANSCRIPT OF RECORD

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*Greenville, S. C.*

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STATEMENT OF CASE

As the result of an action filed in the Court of Common Pleas in the County of Greenville, State of South Carolina, by the Roy Bass Motor Company, Greenville, South Carolina, a receiver was appointed by the Court on April 8, 1952, to take charge of the business operated by the defendant and all of its assets. The receiver took charge of said assets as of the day of his appointment and retained possession of the premises in which said business was operated until May 15, 1952.

In due time various creditors filed claims with the receiver, one of said creditors being Roger P. Scovil, owner of the premises occupied by the insolvent corporation. The insolvent corporation was in possession of the premises under a written lease with the Landlord, Roger P. Scovil, said lease being dated October 12, 1949, and being for the full term five years thereafter and under the terms of said lease, the Lessee was to pay rental on the basis of \$250.00 per month, payable in advance on the first day of each successive month. The rent for the months of February, March and April, 1952, being in arrears and unpaid, the Landlord, on the 7th day of April, 1952, distressed upon all assets of said corporation for the rent then in arrears and, upon filing his claim, the Landlord took the position that said claim constituted a prior lien on the assets of the insolvent corporation by reason of the distress levied against the assets of said corporation for the past rent due.

The United States of America, Appellant herein, likewise filed a claim with the receiver, which claim consisted of the following tax items:

(1) Income tax due by the insolvent corporation in the amount of \$449.96, the assessment list therefor being received by the Collector of Internal Revenue, December 14, 1950, and filed in the R. M. C. Office for Greenville County on April 2, 1951.

4 (2) Payroll taxes in the amount of \$2,895.33, assessment list being received by the Collector on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, February 23, 1952 and February 28, 1952, all of which were filed in the R. M. C. Office for Greenville County on April 10, 1952. Included in the claim for payroll taxes is an item of \$653.77 in connection with which the date of receipt of assessment list by the collector was unavailable.

The Master before whom claims were to be proven, filed a report sustaining the claim of the Landlord as a prior lien, to which report the United States of America filed exceptions. Said exceptions were heard by the Honorable G. Badger Baker, Presiding Judge, Thirteenth Judicial Circuit, who on January 15, 1953, filed an order holding that the claim of the Landlord had priority over the taxes due the United States of America with the exception of the item of income taxes in the amount of \$441.96 referred to as item (1) above.

The sole question raised by this appeal is as to priority between the landlord's lien for rent and the lien of the United States of America for taxes due by the insolvent Corporation.

#### MASTER'S REPORT

The above entitled action was heretofore referred to me for the purpose of determining the priority of various claims against the defendant.

According to the testimony and stipulation entered into by the interested parties, one R. P. Scovil is the owner of the building heretofore occupied by Dan Tasse, Inc. The corporation was occupying said property under a written lease providing for a rental of Two Hundred and Fifty and No/100 (\$250.00) Dollars per month. The monthly installments of rent being payable in advance on the first of each month. The rent for the months of February, March and April, 1952 being in arrears and unpaid, the landlord proceeded on the 7th day of April, 1952 to distress upon the assets of said corporation for said rent in arrears. On the following day, to-wit: April 8, 1952 a receiver for the defendant was appointed by order of this Court. The receiver took charge of the premises on April 8, 1952 and retained possession of the same until May 15, 1952. Consequently, the landlord filed with the receiver a claim for Seven Hundred and Fifty and no/100 (\$750.00) Dollars as rent for the

months of February, March and April, 1952 taking the position that said claim constitutes a prior lien on the assets of the corporation, junior to the cost of administration. The landlord likewise filed a claim for One Hundred, Twenty-Five and no/100 (\$125.00) Dollars as rent from May 1st to May 15, 1952 taking position that this claim constituted a part of the cost of administration.

The landlord likewise made claim in the sum of Two Hundred and no/100 (\$200.00) Dollars for expenses in cleaning and removing from said premises the debris, rubbish, etc. left upon the premises when the same were vacated by the receiver, however, the landlord has since reduced this claim to One hundred and no/100 (\$100.00) Dollars, likewise the sum of Twenty-Six and no/100 (\$26.00) Dollars for expenses in closing an opening in the roof occasioned by the receiver removing certain assets which had been attached to and projected through the roof. Likewise, a claim in the amount of Twenty-One and no/100 (\$21.00) Dollars representing expenses incurred in closing an opening in one of the walls in said building occasioned by the receiver removing from said wall certain fixtures attached to and projecting into said wall; likewise, the landlord made further claim in the amount of Forty and no/100 (\$40.00) Dollars for a laboratory which he had originally installed in said building and which is now missing. However, the receiver pointed out that the laboratory was absent from the premises when he took charge, therefore, the landlord abandoned this claim.

6 Likewise, according to the stipulation entered into, it develops that the corporation in question owed certain taxes to the United States Government; likewise said State and County taxes and also taxes to the City of Greenville, and as stated above, a hearing was had for the purpose of determining the priority of these various claims.

Written arguments have been submitted in behalf of the landlord and in behalf of the United States Government in support of their respective positions that their claims constitute a prior claim as to the assets of said corporation. It appears that assets are insufficient to pay the claim of the landlord and the claim of the United States, and for that reason, it is necessary to determine which claim has priority over the other. The total amount of taxes due the United States is \$3,991.06 Dollars and consists of the following items; Four Hundred, Forty-One and 96/100 (\$441.96) Dollars evidenced by a tax lien filed in the R. M. C. Office for Greenville County, South Carolina on April 2, 1951 representing withholding income taxes for the third quarter of 1950 in the amount of Three Hundred, Sixty-Five and 90/100 (\$365.90) Dollars. The assessment list for which was received by the Collector of Internal Revenue on December 14, 1950. Seventy-Six and 06/100 (\$76.06) Dollars of said amount representing Federal Insurance Contribution

for the fourth quarter of 1950, the assessment list for which was received on December 14, 1950. Also the amount of Two Thousand, Eight Hundred, Ninety-Five and 33/100 (\$2,895.33) Dollars evidenced by tax lien filed in the R. M. C. Office for Greenville County on April 10, 1952 of which amount Four Hundred, Sixty-One and 01/100 (\$461.01) Dollars is payroll taxes for the fourth quarter of 1950, the assessment list for which was received by the collector on March 19, 1951; Five Hundred, Forty-Nine and 06/100 (\$549.06) Dollars is payroll taxes for the first quarter of 1951, the assessment list for which was received by the collector on May 24, 1951; Five

7 Hundred, Ninety-One and 69/100 (\$591.69) Dollars is payroll taxes for the second quarter of 1951, the assessment list for which was received by the collector on October 29, 1951; Five Hundred, Ninety-Two and 03/100 (\$592.03) Dollars is payroll taxes for the third quarter of 1951, the assessment list for which was received on December 3, 1951; Six Hundred, Twenty-Eight and 61/100 (\$628.61) Dollars is payroll taxes for the fourth quarter of 1951, the assessment list for which was received on February 28, 1952 and Seventy-Two and 93/100 (\$72.93) Dollars represents Federal Unemployment Tax for the year 1951, the assessment list for which was received by the collector on February 23, 1952. Also an amount of Six Hundred, Fifty-Three and 77/100 (\$653.77) Dollars representing payroll taxes for the first quarter of 1952. The record does not reveal the date the collector received the assessment list for this item.

The government contends that its claim for taxes is a superior claim to that of the landlord for rent because of 31 U. S. C. A. 191 which states, "the debts due to the United States shall be first satisfied" whenever that person becomes insolvent; and because of 26 U. S. C. A. 3670, 71 and 72 which creates a lien on the property of the taxpayer for unpaid taxes.

It must be here pointed out that prior to the receivership the landlord had caused to be issued a distress warrant for his past due rent and that his landlord's lien as provided by statute, was fully perfected.

With regard to the first contention (31 U. S. C. A. 191), the Supreme Court of the United States held in *United States vs. Waddill, Holland and Flinn*, 323 U. S. 353, 65 S. Ct. 304, that where the landlord's lien for rent had not been perfected and made specific by distress prior to the insolvency, the claim of the United States was prior to that of the landlord. The Court was, however, careful to point out that it was not deciding the question as to which claim would be prior had the landlord perfected his claim prior to the



8 assignment for the benefit of the creditors (there a receivership). The implication from that case is clear that, had the landlord's lien been specific and perfected, the result would have been different.

This section creates a priority in favor of the United States but the time such priority attaches is upon the appointment of the receiver. *People of Illinois ex rel Gordon vs. Campbell*, 67 S. Ct. 340, 329 U.S. 362. And when the receiver was appointed in this case, the insolvents' property upon which landlord had levied, was subject to a perfected and specific lien. The government could have no greater rights in this property than did the insolvent, *United States vs. Yates*, (Texas, 1947) 204 S.W. (2d) 399, and so far as the insolvent was concerned, it was subject to a perfected and specific lien.

On the second point that 26 U.S.C.A. 3670-71-72 creates a lien on the taxpayer's property, the government cites *United States vs. City of Greenville*, 118 F. (2d) 963 but overlooks what the Court of Appeals said on page 966. There Chief Judge Parker said:

"Whether the lien provided by statute is entitled to priority over antecedent liens for taxes *duly perfected* by states or municipalities, is a question which is not before us and which we need not decide. It would seem, however, that the lien was intended to attach to the property subject to existing encumbrances; and this is borne out by the provision that it shall not be valid as against mortgagees, purchasers or judgment creditors until notice thereof is duly filed as provided by the Act."

The case of *Regan vs. Metropolitan Haulage Co., Inc.* 127 N.J. Eq. 487, 14 A (2d) 257, in which the government presented a claim to the receiver similar to the one in this case, is an interesting and pertinent authority. Under the New Jersey statute, a garageman is given a lien on the specific property repaired. No further action on his part is required.

9 There the Court said:

"(5) The government's contention that under Section 3186 (a) of the Revised Statutes, 26 U.S.C.A. Int. Rev. Code, 3670, 3671, its claim is a lien on all property and rights of a debtor, as soon as the assessment list is received by the collector and continues until the liability is satisfied, is correct; but such lien is a general lien upon the estate of the insolvent bankrupt. It does not attach to any specific property covered by a valid specific lien until after the specific lien is first satisfied.

See *Ferris vs. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 A. 577; in re *Wyley*, D. C. 292 F. 900; *Sherwood vs. United*

States, D. C., 5 F. 2d 991; *In re Caswell Construction Co.*, D. C. 13 F. 2d 667."

And so here the government's general lien given by 26 U.S.C.A. 3670 when the assessment lists are received by the collector does not attach to the property upon which the landlord levied his distress until that specific lien is first satisfied.

In *Crawford Co., Inc. vs. L. Leopold and Co.*, 70 N. Y. S. (2d) 183, the question for determination was whether a mechanic's lien filed on November 21, 1944 took precedence over a tax lien created by the receipt of the assessment list in the office of the collector on November 2, 1944. The tax lien was not recorded in any of the places required by 26 U.S.C.A. 3672.

The Court held that the holder of the filed mechanic's lien was a "purchaser" within the meaning of Section 3672 and that as such, he was protected until the lien of the government was recorded. This decision was affirmed by the Court of Appeals for New York in 297 N. Y. 884, 79 N. E. (2d) 279.

In *National Refining Co. vs. United States*, 160 F. (2d) 951, (8th Cir.) a "purchaser" under Section 3672 was defined as one who, for a valuable present consideration, acquires property or an interest in property. Surely, the landlord who gives consideration in the form of the use of the premises, and who acquires an  
10 interest in the specific property by perfecting his lien by way of distress fits this definition.

There is another theory of this case which is applicable. 26 U.S.C.A. 3672 states that a tax lien is not valid as against a mortgage until recorded in the Office of the R. M. C. Under the South Carolina law, the lien of a landlord for past due rent is superior to that of a mortgagee except in two instances, i.e., where the mortgage was executed before the rental contract was entered into, or (2) when it was executed before the chattels were brought upon the rented premises, *Maynard vs. Bank of Kershaw*, 188 S. C. 160, 198 S. E. 188.

The mortgage takes precedence over the federal tax lien until recorded as required by Section 3672; the landlord's lien takes precedence over the mortgage. It necessarily follows that the landlord's lien takes precedence over the federal tax lien.

The same situation was present in *Ferris vs. Chic-Mint Gum Co.*, 14 Del. Ch. 232, 124 A. 577, where the Court said at page 580:

"Here we have three claimants, each claiming certain preferences. The first (the state, county, and city) admittedly outranks the second (the mortgagee) and we have seen that the second outranks the third (the United States). Yet it is contended that the third is to be preferred to the first and thus displace the second from a position of preference over the third."



If this contention be accepted then indeed will the last be declared to be first. When the government agreed by section 3186 to take rank after the mortgagee, it must necessarily follow that it is subordinate in rank to those who are superior to its immediate senior."

To the same effect is *Louisiana State University vs. Hart*, 210 La. 78, 26 So. (2d) 361, 174 A.L.R. 1366 where the Court said:

"It is undisputed that Section 3670 of the Internal Revenue Code creates a tax lien but does not give it priority. It is also undisputed that the general lien created by that statute is inferior to prior mortgages or equitable or legal liens and encumbrances. It would seem to be anomalous, therefore, to say that if a mortgage intervened between the date the attachment was obtained by the Louisiana State University and the date the tax lien of the United States arose, the privilege or lien of the University would be superior to the mortgage, which, in turn, would be superior to the tax lien of the United States, but that the tax lien of the United States would be superior to the privilege of the University. That, however, is the situation that would result if the argument on behalf of the United States is followed to its logical conclusion. We do not think the law sanctions such an anomalous situation."

It would indeed be an unlikely situation to hold that the landlord's lien was superior to a mortgage (and this we must hold under the South Carolina law); to hold that a mortgage was superior to the Federal tax lien not recorded (and this we must hold under 26 U.S.C.A. 3672); and that the federal tax lien was superior to the perfected landlord's lien. The Court will not countenance such a result and as was said in the above cited cases when the government by statute placed a mortgage above its unrecorded tax lien, it necessarily placed above its tax lien any other lien which would take precedence over the mortgage.

For the reasons above stated, I am of the opinion that the lien in the amount of Seven Hundred and Fifty and no/100 (\$750.00) Dollars representing unpaid rent for the months February, March and April, 1952 constitutes a lien on the assets of said corporation superior to the government's tax lien; I am also of the opinion that the landlord's claims in the amount of One Hundred and no/100 (\$100.00), Twenty-Six and no/100 (\$26.00) and Twenty-One and no/100 (\$21.00) Dollars respectively constitutes items properly chargeable to the cost of administration along with the landlord's claim in the amount of One Hundred, Twenty-Five and no/100 (\$125.00) Dollars representing rent for the period May 1, 1952 to May 15, 1952.

12 I therefore respectfully recommend that the receiver, after first paying the cost of the administration including the landlord's claims in the amounts of One Hundred Dollars (\$100.00), Twenty-Six Dollars (\$26.00), Twenty-One Dollars (\$21.00) and One Hundred, Twenty-Five Dollars (\$125.00) respectively, pay the landlord's claim in the amount of Seven Hundred, Fifty and no/100 (\$750.00) representing rent for the months February, March and April, 1952 and the balance of the proceeds in his hands realized from the sale of the assets of the defendant corporation, to the United States for application to its tax lien.

Respectfully submitted,

E. INMAN,  
Master.

September 8th, 1952.

#### ORDER OF JUDGE BAKER

This proceeding comes before me upon appeal from the Report of the Master of Greenville County dated September 8, 1952, establishing the priority of certain claims filed with the Receiver for the insolvent defendant Dan Tasse, Inc. The receiver was appointed on April 8, 1952, and the following claims were filed with him, but not in the order of their priority as I enumerate them:

(a) Claim for rent in the amount of \$750.00, for which distress was levied on April 7, 1952, by Robert P. Scovil.

(b) Claim for \$100.00 for cleaning premises vacated by Receiver; \$26.00, enclosing opening in roof during removal of assets by Receiver; \$21.00, enclosing opening in wall during removal of assets by Receiver; and \$125.00 for rent during occupancy of Receiver.

(c) Claim for property taxes assessed January 1, 1951, for County of Greenville in the amount of \$146.66.

13 (d) Claim for property taxes assessed January 1, 1951, for City of Greenville in the amount of \$136.26.

(e) Claim by South Carolina Employment Security Commission for employment compensation contribution taxes in the sum of \$600.56.

(f) The following claims of the United States: income tax of \$441.96, the assessment list being received by Collector of Internal Revenue on December 14, 1950, filed in the office of the R. M. C. for Greenville County April 2, 1951; claim for payroll taxes in the sum of \$2,895.33, assessment lists being received by the Collector on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, February 28, 1952, and February 23, 1952; all of which were filed in the office of the R. M. C. for Greenville County on April 10, 1952. The foregoing claim for payroll taxes includes \$653.77, on

which the date of receipt of assessment list by the Collector was unavailable.

The Master recommends there should be first paid the costs of administration, which he holds are included in item (b); next, the claim of the landlord for the rent as contained in item (a); and third in order of priority, the claim of the United States Government. He does not make any recommendation for the payment of City and County taxes, or other order of priority.

After study of the record, it is my conclusion the order of priority of claims should be as follows:

(1) The costs of administration which are contained in item (b) of this order. This, of course, should also include Receiver's fees and expenses.

(2) Claim by the United States Government for income taxes in the sum of \$441.96, received by the Collector of Internal Revenue on December 14, 1950, and filed in the office of the R. M. C. on April 2, 1951.

(3) Taxes due the city and County of Greenville in the amounts of \$136.26 and \$146.66, as contained in items (c) and (d).

14 (4) Rent in the amount of \$750.00, as set forth in item (a).

(5) The balance is to be applied to the payment of the remainder of the claims filed by the United States Government.

Having given what should be the order of priority, I will now undertake to give my reasons therefor.

The United States Government contends its claim for taxes is superior to the claim of the landlord for rent by reasons of Sections 3670 and 3671, Title 26, USCA. Section 3670 provides, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any cost, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Section 3671 specifies the lien shall attach as of the date the assessment list is received by the Collector. There will be found, however, in Section 3672, Title 26, USCA, certain exceptions to the vesting of the lien in favor of the United States, which is "such lien shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the Collector in accordance with the law of the State or Territory in which the property subject to the lien is situated \* \* \*". For the purpose of authorizing the filing of notices of lien in accordance with the provisions of Section 3186 of the Revised Statutes of the United States, acts or parts of acts amendatory thereto, the General Assembly of this State passed what is known as the Uniform Federal Tax Lien Registration Act, and

is contained in Vol. 6, Sections 65-2721, 2722, of our 1952 Code of Laws. The income tax lien for \$441.96 which was received by the Collector on December 14, 1950, and filed in the office of the R. M. C. for Greenville County on April 2, 1951, has priority over the rent claim or lien. The landlord's lien for rent was perfected by distress proceedings on April 7, 1952. The Receiver was appointed on April 8, 1952, but the claim for the income taxes was filed on April 2, 1951, which, of course, was prior to the date of the distress and appointment of the Receiver. This item, therefore, clearly takes priority over the rent lien. The remaining items comprising the Government's claim were not filed in the office of the R. M. C. until April 10, 1952, although most of them were received by the Collector in 1951. The Master has found that the perfected lien of the landlord comes within the meaning of "purchaser" as provided in Section 3672, *supra*.

It is needless for me to reiterate the Master's reasons for arriving at this conclusion since I am in accord with him, and for the reasons stated in his order I have made the remaining items of the Government's claim secondary in priority to the lien of the landlord. The taxes for the County and City of Greenville have received priority to the Government items, excepting the income tax lien of \$441.96, and the claim for rent. These taxes were assessed January 1, 1951. Section 65-2701 of the Code of Laws of 1952, provides all taxes, assessments and penalties legally assessed shall be a first lien in all cases whatsoever upon the property taxed, the lien to attach at the beginning of the fiscal year during which the tax is levied.

Section 65-2702 says the tax assessment shall immediately become a first lien on the property as soon as it is listed with the auditor of any county in this state for taxation. The city and county taxes became a first lien on January 1, 1951, subject to the prior lien of the United States Government for the income taxes in division (2) of order of priority, since this claim was received by the Collector on December 14, 1950. The remaining Government items for taxes were not received by the Collector until after January, 1951, consequently, they are inferior to the priority of taxes due the City and County of Greenville. The rent lien is made secondary to the taxes due the City and County of Greenville by

reason of Section 41-162, Vol. 4, Code of Laws of 1952, which is entitled, Taxes Lien on Property Sold Under Distress, and the body of which Act is as follows: "The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon."

The lien of the South Carolina Employment Security Commission has not been overlooked, but it is last in priority and it is apparent there will not be sufficient funds for even the partial satis-



The State of South Carolina

IN THE SUPREME COURT

UNITED STATES OF AMERICA, APPELLANT,

VS.

R. P. SCOVIL, RESPONDENT.

Appeal from Greenville County

G. BADGER BAKER, *Judge*

Case No. 3679

Opinion No. 16789

Filed October 26, 1953

AFFIRMED

John C. Williams, of Greenville, for appellant.

Leatherwood, Walker, Todd &amp; Mann, of Greenville, for respondent.

TAYLOR, A. J.: As the result of an action filed in the Court of Common Pleas in the County of Greenville, State of South Carolina by the Roy Bass Motor Company, Greenville, South Carolina, a receiver was appointed by the Court on April 8, 1952, to take charge of the business operated by the Defendant and all of its assets. The receiver took charge of said assets as of the day of his appointment and retained possession of the premises in which said business was operated until May 15, 1952

In due time, various creditors filed claims with the receiver, one of said creditors being Roger P. Scovil, owner of the premises occupied by the insolvent corporation. The insolvent corporation was in possession of the premises under a written lease with the Landlord, Roger P. Scovil, said lease being dated October 12, 1949, and being for the full term, five years thereafter, and under the terms of said lease, the Lessee was to pay rental on the basis of \$250.00 per month, payable in advance on the first day of each successive month. The rent for the months of February, March and April, 1952, being in arrears and unpaid, the Landlord, on the 7th day of April, 1952, distressed upon all assets of said corporation for the rent then in arrears and, upon filing his claim, the Landlord took the position that said claim constituted a prior lien on the assets of the insolvent corporation by reason of the distress levied against the assets of said corporation for the past due rent.



The United States of America, Appellant herein, likewise filed a claim with the receiver which consisted of the following tax items:

(1) Income tax due by the insolvent corporation in the amount of \$441.96, the assessment list therefor being received by the Collector of Internal Revenue, Dec. 14, 1950, and filed in the R. M. C. Office for Greenville County on April 2, 1951.

(2) Payroll taxes in the amount of \$2,895.33, assessment list being received by the Collector on March 19, 1951, May 24, 1951, August 29, 1951, December 3, 1951, Feb. 23, 1952 and February 28, 1952, all of which were filed in the R. M. C. Office for Greenville County on April 10, 1952. Included in the claim for payroll taxes is an item of \$653.77 in connection with which the date of receipt of assessment list by the collector was unavailable.

The Master before whom these claims were to be proven, filed his report sustaining the claim of the Landlord as a prior lien, to which report the United States of America filed exceptions. Said exceptions were heard by the Honorable G. Badger Baker, Presiding Judge, Thirteenth Judicial Circuit, who on January 15, 1953, filed an Order holding that the claim of the Landlord had priority over the taxes due the United States of America with the exception of the item of income taxes in the amount of \$441.96 referred to as Item (1) above.

The sole question raised by this appeal is as to priority between the Landlord's lien for rent and the lien of the United States of America for taxes due by the insolvent corporation.

There is no question in this case of distress having been perfected prior to the appointment of the receiver; therefore, the lien was perfected as of that time and the amount specified in such distress was not available to the receiver to pay other debts of the insolvent debtor. 31 USCA 191 gives the U. S. Government claim no priority over this lien as the distress, hence the lien, was perfected April 7, 1952, before the appointment of the receiver on April 8, 1952. The Government could have no greater right in the property in the hands of the receiver than the insolvent. *United States vs. Yates*, 204 S. W. (2d) 399, (Texas 1947), *Karno-Smith Co. vs. Maloney*, *Collector of Internal Revenue*, 112 Fed. (2d) 690 (3rd Cir.), *Thelussan vs. Smith*, 2 Wheat. 396, 4 L. Ed. 271, *People of New York vs. United States*, 106 Fed. (2d) 210 (3rd Cir.), *In re. Holmes Mfg. Co.*, 19 Fed. (2d) 239 (Dist. Ct. Conn.).

Section 26 USCA provides that such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector, which in this

case means the Register of Mesne Conveyances. Section 65-2722 of the South Carolina Code for 1952.

22 The Government's tax lien under this section is of force against a Landlord's lien which has been perfected only from the date of recording of such tax lien and, therefore, not effective in the case at bar.

We are of the opinion that all exceptions should be dismissed, the judgment appealed from affirmed and it is so ordered

BAKER, C. J., STUKES and OXNER, JJ., concur. FISHBURNE, J., not participating.

A true copy:

[SEAL]

J. B. WESTBROOK, *Clerk* (s).

R. P.

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In the Supreme Court of the United States

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No. —, OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

R. P. SCOVIL (in re ROY BASS MOTOR CO. v. DAN TASSEY, INC.)

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF  
CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner,  
IT IS ORDERED that the time for filing petition for writ of cer-  
tiorari in the above-entitled cause be, and the same is hereby, ex-  
tended to and including March 25, 1954.

EARL WARREN  
*Chief Justice of the Supreme Court  
of the United States.*

Dated this 22d day of January, 1954.

Supreme Court of the United States

No. 643, October Term, 1953

UNITED STATES OF AMERICA, PETITIONER

*v.*

R. P. SCOVIL, DAN TASSEY, INC., ET AL.

*Order allowing certiorari*

Filed May 24, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of South Carolina is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

**PETITION  
FOR  
WRIT  
of  
CERTIO-  
RARI**

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NO. 35

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

R. P. SCOVIL, ET AL.

Respondents, Petitioners to the Supreme Court of the United States



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# In the Supreme Court of the United States

OCTOBER TERM, 1953

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No. 643

UNITED STATES OF AMERICA, PETITIONER

v.

R. P. SCOVIL, ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina in this case.

## OPINIONS BELOW

The opinion of the Supreme Court of South Carolina (R. 12-14) is reported at 78 S.E. 2d 277. The order of the Court of Common Pleas (R. 8-11) is not reported.

## JURISDICTION

The judgment of the Supreme Court of South Carolina (R. 12, 14) was entered October 26, 1953. On January 22, 1954, Mr. Chief Justice Warren

extended the time for filing a petition for a writ of certiorari to and including March 25, 1954. The jurisdiction of this Court is invoked under 28 U. S.C., Section 1257(3).

This suit (originating as a receivership proceeding (R. 1) ) arises out of conflicting claims for priority of the tax claims of the United States and those of a landlord under a distress for unpaid rents, against the assets of an insolvent debtor in the hands of a receiver appointed by a state court. In the trial court (Court of Common Pleas, Greenville County, State of South Carolina) the United States asserted its right to priority in the payment of its debts under R.S. 3466, and also claimed that Section 3670-3672 of the Internal Revenue Code gave it a lien on property of the taxpayer which was paramount to the landlord's distress claims for rent. (R. 1-11.) The court (on exceptions filed by the United States to the Master's Report (R. 2) ) held that the landlord's distress claim for rents was superior to the claim of the United States for its taxes and that the landlord was entitled to have his claim paid out of the assets in the hands of the receiver before the United States might participate (R. 8-11). On appeal to the Supreme Court of the State of South Carolina, the United States again asserted its claim to priority under R.S. 3466 and the superiority of its tax liens under Sections 3670-3672 of the Internal Revenue Code (R. 11). That court held that the distress claims of the landlord for rent were paramount to the Government's priority claims under R.S. 3466, 31 U.S.C. 191, and

lien of the United States under Sections 3670-3672 (R. 12-14).

The question is one of substance, as is more fully developed under the reasons for granting the writ.

#### QUESTIONS PRESENTED

1. Whether the priority accorded claims of the United States against the assets of an insolvent debtor by R. S. 3466 is defeated by a landlord's lien for rent arrears created by state law, where the landlord has not divested the debtor of possession of any property subject to the lien.

2. Whether the lien accorded the United States for unpaid taxes by Section 3670 of the Internal Revenue Code is rendered subordinate to a subsequently arising landlord's lien created by state law, merely because notice of the federal tax lien was filed after the landlord's lien arose.

#### STATUTES INVOLVED

The pertinent provisions of the federal and state statutes involved are printed in the Appendix, *infra*, pp. 13-16.

#### STATEMENT

This case involves the relative priority of tax claims of the United States and rent claims of a landlord against the estate of an insolvent corporation in receivership, Dan Tassey, Inc. (hereafter sometimes referred to as the taxpayer). The material facts, as disclosed by the statement of the case (R. 1-2), the master's report (R. 2-8), and the opinion below (R. 12-14), are not in dispute.

The claims of the United States are for taxes

assessed against the taxpayer for 1950 and 1951 in the aggregate amount of \$3,549.10, the assessment lists for which were received by the Collector on various dates between March 19, 1951, and February 28, 1952.<sup>1</sup> Notice of federal tax lien covering these assessments was recorded in the Register of Mesne Conveyances for Greenville County, South Carolina, on April 10, 1952. (R. 3-4, 12-13.)

The business of the taxpayer corporation was conducted on premises occupied under a five-year lease from R. P. Scovil (herein sometimes referred to as the landlord) dated October 12, 1949, under the terms of which the lessee (taxpayer) was to pay rental at the rate of \$250 per month, payable in advance on the first day of each month. The rents for the months of February, March, and April, 1952, being in arrears and unpaid, the landlord on April 7, 1952, caused a warrant of distress to be issued upon all the assets of the taxpayer corporation for the \$750 rent then in arrears. On the next day, April 8, 1952, the South Carolina Court of Common Pleas appointed a receiver for the taxpayer and all of its assets. The receiver took possession of the assets the same day and operated the taxpayer's business until May 15, 1952. The United States and the landlord both filed claims against the receiver for the respective amounts owing to

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<sup>1</sup> The tax claims filed with the receiver also included assessments for earlier periods aggregating \$441.96, but these were given priority by the courts below (R. 10, 13), and are no longer involved. With respect to \$653.77 of the amount still in issue, covering payroll taxes for the first quarter of 1952, the date of the receipt of the assessments list by the Collector does not appear. (R. 4.)

them. The assets of the taxpayer corporation were sold at public auction by the receiver, pursuant to court order, for an amount insufficient to satisfy all claims against it. (R. 2-3, 12-13.)

The master filed a report (R. 2-8) holding that the claim of the landlord for unpaid rent was prior and superior to the tax claims of the United States, and the United States filed exceptions (R. 2). The Court of Common Pleas affirmed the master's report (R. 8-12.) <sup>2</sup>

The United States appealed, the only questions presented on the appeal being whether the tax claims were entitled to priority over the landlord's claim, under either Section 3466 of the Revised Statutes of the United States or Sections 3670-3672 of the Internal Revenue Code. (R. 2, 13.) The Supreme Court of South Carolina affirmed the decision of the Court of Common Pleas. (R. 12-14.)

#### SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding, contrary to Section 3466 of the Revised Statutes and the decisions of this Court, that the landlord's rent claim against the insolvent taxpayer was entitled to priority of payment over the tax claims of the United States.

2. In holding, contrary to Sections 3670, 3671, and 3672 of the Internal Revenue Code, and the decisions of this Court, that the landlord's lien for

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<sup>2</sup> Except for the amount of \$441.96 referred to in the preceding footnote, and no longer in issue.



unpaid rent was superior to the antecedent liens of the United States for unpaid taxes.

#### REASONS FOR GRANTING THE WRIT

The tax claim of the United States is entitled to priority of payment, over the rent claim of the landlord, out of the proceeds of the receiver's sale of the insolvent taxpayer's property, under both the federal priority statute (R. S. 3466 (Appendix, *infra*, p. 14)) and the federal lien statute (Internal Revenue Code, Sections 3670-3672 Appendix, *infra*, pp. 13-14). In holding that neither statute made the Government's claim paramount and that the landlord's claim was prior in right, the court below disregarded the controlling decisions of this Court applying the federal priority statute (*United States v. Gilbert Associates*, 345 U.S. 361; *United States v. Waddill Co.*, 323 U.S. 353; *Illinois v. Campbell*, 329 U.S. 362), as well as those applying the federal lien statute (*United States v. City of New Britain*, 347 U. S. 81; *United States v. Security Tr. & Sav. Bk.*, 340 U.S. 47). On the basis of the undisputed facts, and on the authority of this Court's recent decisions in the *Gilbert Associates* and *City of New Britain* cases, it is respectfully submitted that the writ of certiorari should be granted and the decision of the Court below reversed.

1. Section 3466 of the Revised Statutes prescribes that "Whenever any person indebted to the United States is insolvent, \* \* \* the debts due to the United States shall be first satisfied." The pri-

ority accorded the United States in the collection of claims against an insolvent is by the terms of the statute absolute. In a long line of cases this Court has repeatedly held that an adverse lien which has not become both specific and perfected before the debtor becomes insolvent can not serve to deprive the United States of its priority right.<sup>3</sup> *United States v. Gilbert Associates, supra*; *Illinois v. Campbell, supra*; *United States v. Waddill Co., supra*; *United States v. Texas*, 314 U.S. 480; *New York v. MacLay*, 288 U.S. 290; *Spokane County v. United States*, 279 U.S. 80; *United States v. Oklahoma*, 261 U.S. 253; *Thelusson v. Smith*, 2 Wheat. 396; *Field v. United States*, 9 Pet. 182; *Conard v. Atlantic Insurance Co.*, 1 Pet. 386; cf. *United States v. Security Tr. & Sav. Bk., supra*; *Massachusetts v. United States*, 333 U.S. 611; *Illinois v. United States*, 328 U.S. 8. To be "specific," the adverse lien must, among other requirements, attach to particular items of the debtor's property. *Illinois v. Campbell, supra*, pp. 373, 375-376; *United States v. Waddill Co., supra*, p. 359; *United States v. Texas, supra*, p. 485. To be "per-

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<sup>3</sup> In several of the cases the Court has expressly posed but left unanswered the question of whether even a specific and perfected adverse lien can serve as an exception to the absolute priority accorded claims of the United States by the terms of R. S. 3466. *United States v. Texas, supra*, pp. 485-486; *New York v. MacLay, supra*, p. 294; *Spokane County v. United States, supra*, p. 95; *Michigan v. United States*, 317 U.S. 338, 341. "This Court has never actually held that there is such an exception." *United States v. Gilbert Associates, supra*, p. 365. In each instance, the Court has found it unnecessary to reach and decide the question, having concluded that the adverse lien was not sufficiently specific and perfected.

fectured," the lien must be enforced at least to the point of divesting the debtor of either title or possession. *United States v. Gilbert Associates, supra*, pp. 365-366; *United States v. Security Tr. & Sav. Bk., supra*, p. 51; *Illinois v. Campbell, supra*, pp. 375-376; *United States v. Waddill Co., supra*, pp. 357-360. Whether an adverse lien has become sufficiently specific and perfected to overcome the federal priority presents, of course, a federal question. The priority established by Congress in favor of the United States may not be impaired by state legislation or state court decisions creating interests in the debtor's property in favor of third parties. *United States v. Gilbert Associates, supra*; *Illinois v. Campbell, supra*, p. 371; *United States v. Waddill Co., supra*, p. 357. See also *United States v. Security Tr. & Sav. Bk., supra*, p. 51; *United States v. City of New Britain, supra*.

In this case, the Supreme Court of South Carolina has held (R. 13-14) that a lien created by South Carolina law in favor of a landlord became specific and perfected a day before a receiver for the taxpayer-lessee's property was appointed merely by virtue of the issuance of a warrant of distress pursuant to the South Carolina law. Appendix, *infra*, pp. 14-16. But there is nothing in the record to indicate that the landlord had actually divested the taxpayer of the title or possession of any of its property prior to the appointment of the receiver. Recently, in the *Gilbert Associates* case, this Court held that a Town's tax lien was not sufficiently specific and perfected to defeat the federal priority notwithstanding that the Town (p. 362) had "sold"

the taxpayer's property at a tax sale before (and again after) the appointment of the receiver where no change in possession was accomplished. The Court said (p. 366) that "There is no ground for the contention here that the Town had perfected its lien by reducing the property to possession. The record reveals no such action." Similarly, the record here discloses nothing to show that the landlord had reduced the property to possession. See also *United States v. Waddill Co.*, *supra*, pp. 357-360; *Illinois v. Campbell*, *supra*, pp. 375-376. Furthermore, even as a matter of state law the issuance of the distress warrant the day before the receiver was appointed did not operate to divest the taxpayer of possession of any of its property, since no possession could have been obtained until five days after distress.<sup>4</sup> Indeed, any suggestion that the landlord acquired possession would be incompatible with the conceded facts that the receiver took over all the taxpayer's assets and that the landlord's claim is being asserted against the proceeds of the receiver's sale.

Nor is there any basis for the assumption by the

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<sup>4</sup> The distress warrant was issued pursuant to Sections 41-151 and 41-153 of the South Carolina Code Annotated (1952 ed.) (Appendix, *infra*, pp. 14-15). Under Section 41-160 of the State Code (Appendix, *infra*, p. 16), the taxpayer had five days after distress was issued within which to free its property from the distress, during which time it could not be deprived of title or possession. Only after expiration of the five days and upon failure of the tenant to furnish the bond therein provided could the property be sold for the payment of rent due. See Section 41-161 of the South Carolina Code (Appendix, *infra*, p. 16). Furthermore, "The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon." Section 41-162 of the South Carolina Code (Appendix, *infra*, p. 16).

court below that the landlord's lien was specific rather than general, in view of the fact (R. 1, 12) that the landlord had "distressed upon all the assets" of the insolvent taxpayer. "In claims of this type, 'specificity' requires that the lien be attached to certain property by reducing it to possession \* \* \*. Until such possession, it remains a general lien." *United States v. Gilbert Associates, supra*, p. 366. And "Where the lien of the Town [here the landlord] and that of the Federal Government are both general, and the taxpayer is insolvent, § 3466 clearly awards priority to the United States." *Id.*, p. 366. See also *Illinois v. Campbell, supra*, p. 370, 375-376; *United States v. Waddill Co., supra*, p. 359; *United States v. Texas*, 314 U.S. 480, 488.

2. The tax claim of the United States is likewise paramount to the claim of the landlord under the federal lien statute. Sections 3670 and 3671 of the Internal Revenue Code accord the United States a lien for unpaid taxes upon all property belonging to the delinquent taxpayer, the lien arising when the assessment list is received by the Collector. Under this Court's recent decision in the *City of New Britain* case, in which it enunciated the principle of "the first in time is the first in right" for purposes of applying the federal lien statute, the United States must prevail unless the landlord acquired a choate lien before the federal liens attached. See also *United States v. Security Tr. & Sav. Bk., supra*. Here the federal tax liens antedated the landlord's lien. They arose and attached

to all of the taxpayer's property on various dates between March 19, 1951, and February 28, 1952, when the several assessment lists were received by the Collector, whereas the landlord's lien did not arise until the distress warrant was issued on April 7, 1952. (R. 2-4, 12-13.)

The court below nevertheless ruled (R. 13-14) the landlord's claim to be superior under Code Section 3672, which provides that the federal lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector" in a designated recording office. It held (R. 14) that "under this section" the Government's tax lien was effective "only from the date of recording" of the lien (April 10, 1952), which was after the distress warrant was issued. This holding is patently erroneous, for the landlord does not come within any of the excepted categories enumerated in Section 3672; it was not a "mortgagee, pledgee, purchaser, or judgment creditor" within the purview of that section. Cf. *United States v. Gilbert Associates, supra*; *United States v. Security Tr. & Sav. Bk., supra*. And since the landlord's claim does not fall within any of the classes of interests which Section 3672 protects against an unrecorded federal tax lien, whether or when the federal lien was recorded is of no significance here. *United States v. Snyder*, 149 U.S. 210. This case is governed rather by the principle of "first in time is first in right" applied in *City of New Britain*, and under the decision in



that case the federal liens are clearly superior to a subsequently arising landlord's lien.

#### CONCLUSION

The decision below is manifestly erroneous. It is respectfully submitted that the petition for a writ of certiorari should be granted, and the decision below be reversed, without argument or further briefs, on the authority of *United States v. Gilbert Associates, supra*, and *United States v. City of New Britain, supra*.

SIMON E. SOBELOFF,  
*Solicitor General.*

MARCH, 1954.

## APPENDIX

## Internal Revenue Code:

## SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1946 ed., Sec. 3670.)

## SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1946 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798].  
VALIDITY AGAINST MORTGAGEES, PLEDGEES,  
PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is

authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

\* \* \* \* \*

(26 U.S.C. 1946 ed., Sec. 3672.)

### Revised Statutes of the United States:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1946 ed., Sec. 191.)

### South Carolina Code Annotated (1952 ed.):

Title 41. Landlord and Tenant. Chapter 4.  
Collection of Rent by Distraint.

SEC. 41-151. *Collection of rent by distress.*

A landlord may enforce collection of rent due by distress in the following manner, to wit:

Any magistrate in the county in which the premises occupied are situated may issue, upon receipt of an affidavit of the landlord or his agent setting forth the amount of rent due, his distress warrant in which shall be named the amount of rent due with costs and such warrant shall be delivered to (a) any regular constable, (b) such special constable as the magistrate may appoint or (c) the sheriff of the county for enforcement.

SEC. 41-153. *Distraint on tenant's property if rent and cost not paid.*

Such officer shall forthwith demand of the tenant payment of the rent with costs as named in the distress warrant. If such amount be paid the officer shall return the warrant with the amount collected to the magistrate who shall settle with the landlord. But if the tenant fail or refuse to pay such rent with costs the officer shall distrain sufficient of the property upon the rented premises to pay such amount, giving the tenant a list in writing of the property distrained together with a copy of the distress warrant.

SEC. 41-158. *Only reasonable amount of property to be distrained.*

Any distress must be reasonable in respect to the amount of property distrained.

SEC. 41-159. *Damage for unreasonable distress.*

Any lessor or landlord who makes unreasonable and excessive distress shall be liable for all

damages sustained by the tenant whose goods are distrained by reason of such excessive distress. Such damage may be recovered by an action in any court of competent jurisdiction.

SEC. 41-160. *Tenant may free property from distraint by giving bond.*

Within five days after such distraint the tenant may free the property from the lien of the distraint by giving a bond payable to the landlord in double the amount claimed, with sufficient surety or sureties approved by the court, and the issues thus joined shall be tried by the court. The landlord shall have the right to except to the surety or sureties and the surety or sureties shall justify before the magistrate as provided for justification for sureties in claim and delivery actions.

SEC. 41-161. *Sale of property distrained.*

If the tenant fails to give bond as above prescribed then the officer may sell such property at public auction to the highest bidder for cash at a designated place of sale after posting a notice of such sale for five days upon the premises and two other public places in the county stating the time and place of such sale.

SEC. 41-162. *Taxes lien on property sold under distress.*

The purchaser at a sale of chattels seized under a distress warrant shall take the property subject to any lien for taxes thereon.